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2 **BEFORE THE POLLUTION CONTROL HEARINGS BOARD**
3 **STATE OF WASHINGTON**

4 **JERRY THEIS,**

5 **Appellant,**

6 **v.**

7 **STATE OF WASHINGTON,**
8 **DEPARTMENT OF ECOLOGY,**

9 **Respondent.**
10

)
) **PCHB NO. 94-112**
)
)

) **ORDER OF DISMISSAL AND**
) **DENIAL OF MOTION**
) **FOR CONTINUANCE**
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11 This matter was set for hearing before the Pollution Control Hearings Board on October
12 13, 1994, at 9 00 a m in Lacey, Washington

13 Respondent appeared by its counsel Mark Jobson

14 Appellant Jerry Theis failed to appear in person but, instead, appeared by telephone

15 Administrative Appeals Judge Phyllis Macleod presided over a telephone conference
16 between the parties during the time that the hearing was scheduled Based upon the record and
17 that telephone conference, the Board enters the following

18 **FINDINGS OF FACT**

19 **I**

20 Appellant filed his appeal on June 24, 1994, arising out of limitations and conditions
21 placed by the respondent on its approval of the change of withdrawal for appellant's surface
22 water right

23 **II**

24 The files of the Pollution Control Hearings Board contain a certificate showing that
25 notice of the date, time and place of hearing was mailed to appellant on June 30, 1994, to the last
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2 known address appellant provided. The notice set the hearing for October 13, 1994, at the
3 Board's office in Lacey Washington

4 III

5 On October 11, 1994, appellant contacted the Board's office by telephone and left a
6 message for the presiding administrative appeals judge that he could not attend the hearing on the
7 date scheduled due to work conflicts, but that he would be willing to attend the hearing if it was
8 held in Wenatchee, Washington

9 IV

10 On or about October 12, 1994, appellant also contacted by telephone the Assistant
11 Attorney General assigned to the case, Mark Jobson, to inform him that appellant could not
12 attend the hearing. In response to appellant's request for a continuance of the hearing, Mr
13 Jobson indicated that he would not object to appellant's request but that the respondent did not
14 seek a continuance. As a result of this conversation, Mr. Jobson informed his witnesses, who are
15 located in Yakima, Washington, not to travel to the October 13th hearing

16 V

17 On October 12, 1994, Administrative Appeals Judge Suzanne Skinner placed several
18 telephone calls to the appellant and left messages on both his home and work answering
19 machines requesting that he contact her immediately because the Board had insufficient
20 information regarding why appellant could not appear for the hearing to rule on his requested
21 continuance

22 VI

23 Appellant did not contact Judge Skinner or any other judge or board member of the
24 Pollution Control Hearings Board before the hearing date to explain and substantiate his request
25 for a continuance
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2 **VII**

3 On October 13, 1994, appellant telephoned the Board prior to the 9 00 a m starting time.
4 to request a continuance Shortly thereafter, Judge Macleod presided over a telephone
5 conference between the parties, in lieu of the hearing, during which appellant stated that he was
6 unable to attend the hearing due to work obligations Appellant also stated that he considered
7 traveling to Lacey to attend the hearing to be a considerable burden

8 **VIII**

9 Based upon these Findings of Fact, the Board comes to the following

10 **CONCLUSIONS OF LAW**

11 **I**

12 The Board has jurisdiction over this matter pursuant to RCW 43 21B

13 **II**

14 Continuance of a hearing is within the discretion of the Board WAC 371-08-165(1)

15 **III**

16 The Board's rules require that a request for continuance be made by written motion.
17 accompanied by a proposed order The party moving for the continuance is to seek the
18 stipulation of the other parties Moreover, the clerk of the Board is to be consulted to ascertain
19 an alternative hearing date, the alternative hearing date should be indicated in the proposed order
20 WAC 371-08-165(2) Appellant failed to comply with these requirements of WAC 371-08-
21 165(2)

22 **IV**

23 The Board's rules nevertheless allow that the presiding officer may waive any non-
24 jurisdictional rule for any party not represented by counsel, such as the appellant, to avoid
25 manifest injustice WAC 371-08-061
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2 V

3 Appellant failed to contact the Board to indicate that he wanted a continuance until two
4 days before the hearing. Moreover, even though appellant had been notified of the hearing date
5 in June, the only justification appellant proffered in support of his last-minute requested
6 continuance was that he had unidentified, and unsubstantiated work conflicts. Given these facts,
7 waiver of the Board's rules to prevent manifest injustice is not warranted.

8 VI

9 As appellant failed to appear for hearing, and failed to request timely and obtain a
10 continuance, in accordance with WAC 371-08-165(1), this action is subject to dismissal under
11 WAC 371-08-167(1). Pursuant to that rule, appellant has seven days from the service of this
12 order to file a written motion with the Board, with a copy served on the respondent, requesting
13 that this order be vacated, and stating appellant's grounds for the request. Id.

14 VII

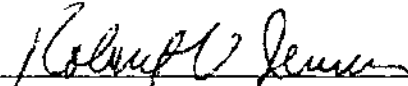
15 Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.
16 From these Conclusions of Law, the Board enters the following
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2 **ORDER**


3 IT IS ORDERED that appellant's untimely motion for continuance is DENIED and the
4 appeal is DISMISSED

5 DONE this 9th day of November, 1994

6 **POLLUTION CONTROL HEARINGS BOARD**

7 
8 ROBERT V. JENSEN, Chairman

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10 RICHARD C. KENLEY, Member

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12 JAMES A. TUPPER, JR., Member

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